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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MADISON SQUARES ANAHEIM HILLS, Plaintiff, Cross-defendant and Respondent, v. S & J ELECTRIC, Defendant, Cross-complainant and Appellant; STEVE JAWORSKI, Defendant and Appellant.	G035914 (Super. Ct. No. 00CC10378) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed as modified.

Jeffrey W. Virden; Law Office of Jerome Edelman and Jerome Edelman for Defendants, Cross-complainant and Appellants.

Hagan & Associates, Cara J. Hagan and Bryn C. Ma for Plaintiff, Cross-defendant and Respondent.

Defendant and cross-complainant S & J Electric and defendant Steve Jaworski appeal from a money judgment in favor of plaintiff and cross-defendant Madison Squares Anaheim Hills for breach of a construction contract. They claim the court erred in finding breach and that damages for both completion of work and lost profits were improper. The record reflects defendants breached the contract and plaintiff was entitled to recover the amount necessary to complete defendants' unperformed work. But there was insufficient evidence of lost rents and the judgment is reversed to the extent it awards plaintiff $100,000 for lost profits. Otherwise the judgment is affirmed.

FACTS

In June 1998 the parties entered into a contract whereby defendants agreed to provide electrical work for a storage facility plaintiff was developing. The contract required defendants to begin work within five days after plaintiff gave them notice to do so and to "perform in a continuous, professional and aggressive manor [*sic*], completing . . . all [its] portion . . . of the work contracted for no later than twelve (12)±." Craig Clausen, plaintiff's owner, testified that the term meant once defendants' work was started, "it could and should be completed within 12 months, plus or minus." "Plus or minus" means "[a] couple months, one way or the other," that is a 10- to 14-month range from commencement.

Michael Mejia, plaintiff's project supervisor, testified he routinely kept calendars detailing work on the project. They showed defendants' first day on the job was in April 1999, although defendants had placed a storage bin containing equipment on the property in the summer of 1998 about the time grading had started.

Defendants began billing for work in November 1998. The first invoice showed the job was 30 percent completed. The second invoice, in December, showed 50 percent completion. Clausen testified defendants had not in fact completed those

portions of their work when the bills were presented. According to Mejia by the end of June 1999 defendants had completed only two to five percent of the job and they were absent during July although there was work to be done.

Over the next two months defendants' attendance at the site was sporadic at best and when present there was an insufficient number of workers. During that time Mejia made repeated phone calls to defendants, often unable to reach anyone, and when he left messages he received no return calls. Even when defendants promised to come to the site, they failed to do so.

As a result in early September Mejia sent a letter to defendants stating, "This job must be manned with a crew of adequate size and expertise [within the next week] . . . . The alternative is for me to send you a certified 48-hour notice to perform or quit with copies to the . . . state contractors board." It continued, "This job has clearly been abandoned by your firm. . . . You have not kept any promises to perform since August 12, . . . includ[ing] your promise to show up . . . today . . . ." In response, defendants sent workers for a few days during the next two months but did not return to the job after the end of October.

In mid-November plaintiff's lawyer sent a letter to defendants, stating they had not had a sufficient number of workers on the job, causing a delay in constructing the project. It demanded that defendants return to the job within 48 hours, with a sufficient crew, and complete their work within 4 weeks or the contract would be terminated and a replacement hired. When defendants did not comply, a second such letter was sent in mid-December. Based on defendants' failure to respond, plaintiff hired another electrical contractor who began at the end of December 1999 and worked continuously until mid-April 2000. In addition to completing the electrical work, portions of what defendants had installed had to be redone. The project was completed at the end of May 2000.

Plaintiff then sued defendants for breach of contract; S & J cross-complained for breach of contract based on plaintiff's alleged premature termination of

the contract. After a bench trial the court ruled in favor of plaintiff on the complaint and the cross-complaint. It found defendants breached the contract by failing to timely and consistently perform their contracted work. It awarded plaintiff just over $233,000, comprised of $100,000 in lost rent and the balance for plaintiff's cost to hire another contractor to complete defendants' work, less applicable setoffs. The court denied defendants' motion for new trial.

DISCUSSION

1. Breach of Contract

Defendants argue they did not breach the contract because plaintiff prematurely terminated it, thereby committing a breach itself. We disagree.

In support of their argument defendants focus heavily on the time period in which they had to complete their work and when they began performing. They rely on Clausen's testimony that, per the terms of the contract, completion within 14 months of commencement of defendants' work was "acceptable." They also emphasize plaintiff's inconsistent testimony about when defendants started work on the project, the summer of 1998 when it placed a storage bin on the property, November 1998 when it began billing, or April 1999 when Mejia's notes show they first began work.

Defendants claim that based on the April 1999 date, they had 14 months, until June 2000, to complete their job. Thus, they argue, when plaintiff sent the letter in November 1999 demanding completion within four weeks, they still had six months to finish their work and plaintiff prematurely terminated the contract.

This argument misses the point. The evidence shows that before plaintiff sent the letter in November, defendants had failed to properly perform under the contract. From the beginning of the project they appeared only sporadically. Even when they were at the site, they did not send a sufficient number of workers to get the job done as

required. This led to delay and interference with other trades performing their portions of the work.

Defendants assert that their delay was not a breach because the contract contained no time of the essence provision. The general rule is that "'[d]elay in performance is a material failure [of consideration] only if time is of the essence, i.e., if prompt performance is, by the express language of the contract or by its very nature, a vital matter. [Citations.]' [Citation.]" (*City of Larkspur v. Marin County Flood Control etc. Dist.* (1985) 168 Cal.App.3d 947, 954, italics omitted.) Although the contract here did not use the express term "time is of the essence," it did contain language requiring "prompt performance" by stating that defendants were to "perform in a continuous, professional and aggressive [manner] . . . ."

The 12 month ± was not the only language dealing with time of performance. That the construction period was 14 months does not mean defendants could work at will while delaying other trades and holding up the project. Defendants were aware of the problems their lack of prompt performance caused; they agreed to allow another electrical contractor to finish part of the rough electrical work because they had failed to complete it. And, contrary to defendants' claim, plaintiff's demand they return to the job with sufficient crew and complete work within four weeks was not "moving the completion date forward"; it was an appropriate demand to perform under the contract terms. The court properly found defendants breached the contract.

2. Damages

Defendants make two arguments regarding damages: 1) the award of lost rents plus payment to another contractor to complete the job constitutes "double damages" (bold and capitalization omitted); and 2) there was insufficient evidence to support the award of lost profits. We discuss in reverse order.

Plaintiff sought to recover $50,000 per month for four months of lost rent based on its claim that it was delayed in opening for that period due to defendants' breach. Defendants state that the only evidence on this subject was Clausen's testimony: "We did $56,000 the first six days [plaintiff opened the facility], not including free rent." "Q. Outside of 50 percent occupancy rate, what's the income that you derive each month? [¶] . . . [¶] A. [S]lightly more than $50,000." Plaintiff cited to no evidence in its brief as to lost profits.

In the statement of decision the court noted: "There was no documentation introduced to corroborate this loss of rental income and there was no evidence to establish whether the $50,000.00 monthly was before or after taxes and overhead." Nevertheless the court awarded $100,000 in lost rents for two months based on a preponderance of the evidence. This was error.

"'Damage awards in injury to business cases are based on net profits. [Citation.]' [Citation.]" (*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 287.) "'"Net profits are the gains made from sales "after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed." [Citation.]'" [Citations.] A plaintiff must show loss of net pecuniary gain, not just loss of gross revenue. [Citations.]' [Citation.]" (*Ibid*.)

Here, as the statement of decision reflects, there is no evidence showing that the $50,000 amount is a net loss as opposed to gross revenue. At oral argument plaintiff's lawyer said that the amount was net profits and stated that the accountant had testified to that effect. But counsel failed to cite to any record references to support the claim. The respondent's brief merely states that it had "clearly set forth the evidence which demonstrated the loss of $50,000 per month" and plaintiff's accountant "testif[ied] to such evidence . . . ." Again, there is not one reference directing us to anything in the record supporting this claim. "'The reviewing court is not required to make an independent, unassisted study of the record in search of error . . . . It is entitled to the

assistance of counsel.' [Citation.]" (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 871.) Thus, plaintiff did not meet its burden to prove the amount of net loss of rent.

Further, contrary to plaintiff's argument, defendants had no responsibility to "flesh out" additional evidence at trial as to the nature of this amount. (*Fields v. Riley* (1969) 1 Cal.App.3d 308, 313 ["burden of proof is on the plaintiff to prove [its] damages with reasonable certainty"].) And that the trial court found there was proof by a preponderance of the evidence does not make it so. There must be actual evidence. "Factual assertions on appeal cannot rest solely on citations to the decision of the trial court." (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379.) Additionally, this finding is belied by another finding of the trial court that there was no evidence showing whether the $50,000 was net or gross. This, combined with plaintiff's failure to point to anything in the record to show the figure was net, demonstrates that the judgment for lost rents was not supported by sufficient evidence and must be reversed.

It is difficult to understand defendants' first argument regarding double recovery. It appears to be based on the premise that plaintiff paid the replacement electrical contractor extra to complete the job within the 12 month ± period set out in defendants' contract and thus there was no delay giving rise to lost rents. There are several problems with this argument but we need not address them. We have determined plaintiff did not prove lost profits; that removes the possibility of a double recovery.

DISPOSITION

The judgment is reduced by $100,000. In all other respects the judgment is affirmed. The parties shall bear their own respective costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.